



HIGH COURT OF KIRIBATI

Criminal Case No 7/2016

THE REPUBLIC

v

MARK THOMAS

Teanneki Nemta for the Republic
Teetua Tewera for the accused

Date of sentencing: 11 February 2019

SENTENCE

- [1] Mark Thomas has pleaded guilty to the following charges under the *Penal Code*: 1 count of attempted rape, contrary to section 130; and 1 count of assault occasioning actual bodily harm, contrary to section 238.
- [2] Despite the repeal and replacement of section 130 by section 3 of the *Penal Code (Amendment) and the Criminal Procedure Code (Amendment) Act 2017*, which commenced on 23 February 2018, this case proceeds under the *Penal Code* as it was in force on the date of the offence (section 10(2) of the amending Act).
- [3] The offences were committed on 11 April 2015, on a beach at Temwaiku on South Tarawa. The complainant was aged 16 years at the time, and the prisoner was 23. The complainant had been drinking fermented yeast with her cousin and another friend. She was drunk. She lay down on the beach next to her companions and fell asleep. The complainant awoke to find the prisoner naked and on top of her. Her top and bra had been removed. The prisoner was attempting to remove her lavalava. The complainant could feel the prisoner pressing his erect penis into the crotch of her panties.
- [4] The complainant struggled to try and get out from underneath the prisoner. She pulled his hair and pushed him away. The prisoner responded by slamming the complainant's head against the ground and punching her twice in the face, causing her nose to bleed.

- [5] It turned out that the prisoner, who knew the complainant well as they were neighbours, had joined the complainant's companions after she had gone to sleep. When they too went to sleep, the prisoner took the opportunity to attack the complainant.
- [6] An information was originally filed on 28 January 2016. For reasons unclear, the matter was not mentioned in court until 30 July 2017. It was mentioned again on 1 August 2017, but then lay dormant until it came before me on 18 July 2018, by which time the prisoner had gone to Australia to undertake seasonal work. Counsel for the prisoner objected to the information on the basis that it failed to comply with section 70 of the *Criminal Procedure Code* (Cap.17). On 20 July the Attorney-General rectified the defect by filing a fresh information (in the same terms) signed by her. The prisoner returned from Australia in January this year, and made his first appearance before me on 1 February. Counsel for the prisoner informed the court that his client would be pleading guilty to both charges. Submissions on sentence were heard on 6 February.
- [7] The prisoner is now 27 years of age. He is married, with a 5-year-old step-daughter and a 2-year-old daughter. He completed the course at the Marine Training Centre in 2017, but has been unable to obtain work as a seafarer. He is keen to return to Australia for another period of seasonal work, but his conviction for these charges will likely make that impossible. He is the sole breadwinner for his family. The prisoner can offer no explanation for his conduct, other than to say that he was very intoxicated, having consumed a large quantity of fermented yeast.
- [8] In determining the appropriate sentence for the prisoner, I am mindful of the approach to sentencing recommended by the Court of Appeal.¹ The maximum penalty for attempted rape is 7 years' imprisonment, while the maximum penalty for assault occasioning actual bodily harm is imprisonment for 5 years. Applying the totality principle, I will impose a single sentence in respect of both counts that I consider meets the gravity of the prisoner's offending.
- [9] Counsel for the prosecution submits that the only appropriate sentence in this case is one of immediate imprisonment. Counsel for the prisoner concedes that a custodial sentence is appropriate, although he argues strongly that the personal circumstances of his client warrant suspension of any such sentence. Of course, suspension is only available where the sentence to be imposed is 2 years or less.
- [10] This is a serious case. A young woman was attacked while asleep and completely defenceless. When she woke up and resisted, the prisoner responded with violence. Placing some reliance on the case of *Aamon Riaua v Republic*,² I am of

¹ *Kaere Tekaei v Republic* [2016] KICA 11, at [10].

² [2001] KICA 14.

the view that, in a contested case of attempted rape with additional (but not extreme) violence, an appropriate starting point is a sentence of imprisonment for 3 years.

- [11] The youth of the complainant and the fact that she was attacked while asleep and defenceless are aggravating factors of this case, for which I increase the prisoner's sentence by 6 months.
- [12] As far as mitigating factors are concerned, the prisoner has no previous convictions. I am prepared to consider his plea to be an early one, for which he is entitled to a significant reduction in sentence. I am satisfied that he is remorseful for his actions. For these matters I reduce his sentence by 11 months.
- [13] It is relevant that there has been an unacceptable delay in the prosecution of this case. It has been almost 4 years since the commission of the offence. While some of this delay can be attributed to the prisoner's absence in Australia, most of it is not his fault. For the reasons discussed by the Court of Appeal in *Li Jian Pei*, the prisoner is entitled to a modest reduction in sentence to compensate him for the breach of his constitutional right to be afforded a fair hearing within a reasonable time.³ I therefore reduce his sentence by a further 3 months.
- [14] I take into consideration the fact that the prisoner has spent 5 days in custody awaiting sentence.
- [15] The prisoner is convicted on his pleas of guilty. Taking all of the above matters into account, he is to be imprisoned for a period of 2 years and 4 months. The sentence is to run from today.


Lambourne J
 Judge of the High Court



³ *Attorney-General v Li Jian Pei & Taaiteti Areke* [2015] KICA 5